gain an unfair advantage in the U.S. market."[47] However, the Commission's jurisdiction over a carrier with bottleneck control in a Latin American market is the same regardless of whether it is controlled by TI or MCI.

Finally, the Commission stated that its traditional safeguards, including dominant carrier regulation, are sufficient to address the abuses of U.S.-owned foreign carriers.[48] However, the Commission found nothing in the record -- not even a single anecdote -- to establish that these same safeguards have been or would be insufficient for foreign carriers.[49] The Commission's failure to apply the less restrictive alternative of its traditional safeguards violates the Due Process Clause.[50]

47/ Foreign Carrier Entry Order at ¶ 105.

48/ Foreign Carrier Entry Order at ¶ 105.

49/ TLD pointed out that there was no evidence in the record that the Commission's dominant carrier regulation and other safeguards had not effectively prevented all potential anti-competitive abuses. TLD Comments at 38-43; TLD Reply Comments at 14-19.

50/ As the Supreme Court has recognized, a justification for an alienage-based classification must have a concrete factual basis: the mere possibility of a problem is not sufficient to constitute a compelling interest. See Bernal v. Fainter, 467 U.S. at 227-228) ("The possibility that some resident aliens are unsuitable for the position [of notary public] cannot justify a wholesale ban against all resident aliens. . . .[the] State fails to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative, problem to the State. Without a factual underpinning, the State's asserted interest lacks the weight we have required of interests properly denominated as compelling."). See also In re Griffiths, 413 U.S. 717, 724-725 (Rejecting Connecticut's contention that resident aliens might harbor divided loyalties, thus rendering them unable, as lawyers, to properly serve the courts and their clients).

3. The Stated Goals Of The Rulemaking Would Be Furthered By Covering U.S.. Carriers To The Same Extent They Are Furthered By Covering Foreign-Affiliated Carriers

Finally, the Commission repeated the NPRM contention that applying the same standard to U.S. carriers would not further the goals of the proceeding.[51/] The stated goals of the rulemaking are: (1) to promote effective competition in the global market; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.[52/] None of these objectives provides even a rational basis for the Commission's discriminatory double standard.

a. Promote Effective Competition

The Commission would promote effective competition at least as much by subjecting U.S. carriers to the ECO analysis as it would by covering foreign carrier "affiliations" in third countries. The Commission offered no explanation why it would "promote effective competition" to apply the ECO analysis to TLD's routes to Latin America while ignoring the ECO analysis when examining the affiliated routes of U.S. carriers like MCI or GTE. MCI has at least as much ability to promote effective competition in Belize (and GTE in the Dominican Republic) as TI does in Peru.

b. Prevent Anticompetitive Conduct

Similarly, application of the ECO analysis to U.S. carrier applications to serve "affiliated" countries would do at least as much to prevent anticompetitive conduct as using the ECO analysis on TLD applications to serve Latin American

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51/ Foreign Carrier Entry Order at ¶ 105 (citing NPRM at ¶ 50).

52/ Foreign Carrier Entry Order at ¶ 6; NPRM at ¶ 1.

affiliates.[53] In fact, since U.S. carriers with controlling interests in foreign carriers typically have a much larger U.S. market share than TLD, they represent a much greater threat of anticompetitive conduct.

The only basis for contending that the discriminatory application of the ECO analysis was needed to prevent anticompetitive conduct was that the Commission has jurisdiction over U.S. carrier licenses to operate on those routes.[54] As shown above, this argument cannot justify the rule's discriminatory treatment because the Commission has the same jurisdiction over TLD's licenses on those routes.

c. Encourage Foreign Governments To Open Their Communications Markets

Finally, the Commission states that it will not apply the ECO analysis to U.S. carriers' investments since that could retard the liberalization of foreign telecommunications markets: "Because U.S. carriers are a significant source of capital in liberalizing markets, we find that such a measure would do far more to inhibit the development of effective competition than it would to enhance it."[55] TLD agrees. But this statement applies with equal force to TI and some other foreign carriers. Indeed, TI has been a greater source of capital than any U.S. carrier for privatizing, developing

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[53] Indeed, in response to a recent GTE Telecom Inc. application to provide IMTS resale, a number of U.S. carriers recently opposed grant of the applications on GTE's affiliated routes to the Dominican Republic and Venezuela. In File No. ITC-95-443, see AT&T Petition To Deny In Part (Oct. 13, 1995) (asking Commission to deny application to resell international services to the Dominican Republic and Venezuela because of above-cost accounting rates); WorldCom's Petition To Deny In Part (Aug. 23, 1995) (asking Commission to deny application for service to the Dominican Republic because of allegedly discriminatory accounting rate practices of GTE affiliate); Sprint's Comments (Sep. 11, 1995) (same). See also AT&T Petition to Deny in Part, ITC 95-561 (Nov. 20, 1995) (asking Commission to deny GTE Mobilnet application to resell international services to the Dominican Republic and Venezuela).

[54] Foreign Carrier Entry Order at ¶ 106.

[55] Foreign Carrier Entry Order at ¶ 106.

and liberalizing telecommunications systems in Latin America. As shown in Part II.A above, TI has made extensive investments in Latin America which has led to the laudable liberalization in Chile and the privatization and development of telecommunications systems in Argentina, Peru and elsewhere.

IV. CONCLUSION

The Commission's decision to apply the ECO analysis on routes to third countries where a carrier has alien investments above 25%, but not where U.S. carriers have control of affiliates in third parties creates a double standard that is poor telecommunications policy and a violation of the Fifth Amendment.

Therefore, the Commission should limit application of the ECO analysis to a foreign-affiliated carrier's home market. However, if the Commission elects to continue to apply the ECO analysis on routes to affiliated third countries, then it must also apply the ECO analysis to U.S. carriers with controlling interests in foreign carriers.

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Respectfully submitted,

TELEFÓNICA LARGA DISTANCIA DE PUERTO RICO, INC.

Alfred M. Mamlet
Stewart A. Baker
Philip L. Malet
Marc A. Paul
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
(202) 429-3000

Counsel for Telefónica Larga Distancia de Puerto Rico, Inc.

Of Counsel:

Encarnita Catalán-Marchán
María Pizarro-Figueroa
Telefónica Larga Distancia de Puerto Rico, Inc.
Metro Office Park
Building No. 8, Street No. 1
Guaynabo, PR 00922

CERTIFICATE OF SERVICE

I, Sandra R. Hammond-Murdico, do hereby certify that a copy of the foregoing **TLD's Petition For Reconsideration** has been sent, via first class mail, postage prepaid, on this 29th day of January, 1996 to the following:

Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, DC 20554

Commissioner Susan B. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Julius Genachowski
Special Counsel
Office of the Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Scott Blake Harris, Bureau Chief
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800A
2000 M Street, N.W.
Washington, DC 20554

Jennifer Warren
Legal Advisor
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800A
2000 M Street, N.W.
Washington, DC 20554

Diane J. Cornell, Division Chief
Telecommunications Division
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800A
2000 M Street, N.W.
Washington, DC 20554

Brian O'Connor, Chief
Policy & Facilities Branch
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800A
2000 M Street, N.W.
Washington, DC 20554

Troy Tanner
International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, DC 20554

Susan O'Connell
Policy and Facilities Branch
Telecommunications Division
International Bureau
Federal Communications Commission
Room 800, Stop Code 0800A
2000 M Street, N.W.
Washington, DC 20554

Kenneth Schagrin
International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, DC 20554

Don Gips
Office of Plans and Policy
Federal Communications Commission
Room 822
1919 M Street, N.W.
Washington, DC 20054

International Transcription Service
Suite 140
1919 M Street, N.W.
Washington, DC 20036

Sandra R. Hammond-Murdico

Sandra R. Hammond-Murdico